



**MINUTES  
FREMONT PLANNING COMMISSION  
REGULAR MEETING OF JANUARY 23, 2014**

**CALL TO ORDER:** Chairperson Reed called the meeting to order at 7:00 p.m.

**PRESENT:** Chairperson Reed, Commissioners Bonaccorsi, Chugh, Dorsey, Jones, Leung, Pentaleri

**ABSENT:** None

**STAFF PRESENT:** Wayne Morris, Principal Planner  
Prasanna Rasiah, Deputy City Attorney  
Cliff Nguyen, Senior Planner  
Joel Pullen, Senior Planner  
Alice Malotte, Recording Clerk  
Chavez Company, Remote Stenocaptioning  
Napoleon Batalao, Video Technician

**Chairperson Reed** introduced new Commissioner Brannin Dorsey.

**Commissioner Dorsey** stated that she was a first grade teacher at Parkmont Elementary School and was proud to be part of the education system in the City. She hoped that her point of view would assist the Planning Commission and the City of Fremont to be a better place to live.

The Commissioners welcomed Commissioner Dorsey. **Commissioner Bonaccorsi, Commissioner Chugh** and **Chairperson Reed** have known her in other educational capacities.

**APPROVAL OF MINUTES:** Regular Minutes of November 14 and December 12, 2013, and January 9, 2014, were approved as submitted.

**DISCLOSURES:** **Commissioners Dorsey, Commissioner Leung, Commissioner Chugh,** and **Chairperson Reed** visited or drove by the site of Item 2.

**CONSENT CALENDAR**

THE CONSENT LIST CONSISTED OF ITEM NUMBER 1.

IT WAS MOVED (JONES/CHUGH) AND UNANIMOUSLY CARRIED BY ALL PRESENT THAT THE PLANNING COMMISSION TAKE THE FOLLOWING ACTION ON ITEM NUMBER 1.

- Item 1. **SMOKING PIG BBQ - 3340 Mowry Avenue - (PLN2014-00108)** - To consider a Conditional Use Permit for live entertainment as an accessory use to the restaurant located within the Downtown District and to consider a categorical exemption from the California Environmental Quality Act (CEQA) per CEQA Guidelines Section 15301, Existing Facilities.

APPLICATION WAS WITHDRAWN.

**PUBLIC/ORAL COMMUNICATIONS** - None

### **PUBLIC HEARING ITEMS**

- Item 2. **PACIFIC COMMONS MAJOR AMENDMENT – Planning Area 5 of Pacific Commons - (PLN2014-00138)** - To consider a Planned District Major Amendment to P-2000-214 to allow development of a 50,000-square-foot sporting goods store, 6,500-square-foot eating establishment and 3,000 square-foot retail space within Planning Area 5 of Pacific Commons (The Block). An Environmental Impact Report (EIR) and Supplements to the EIR were previously certified in accordance with the California Environmental Quality Act (CEQA) and no further environmental review is required.

**Senior Planner Nguyen** provided a brief overview, which included Planning Area 5 (The Block). He introduced Senior Vice President of Catellus Development, Sean Whiskeman, and project architect, Norman Sears, with SPGA. The 50,000-square foot sporting goods store (Dick's Sporting Goods) and the 6,500-square foot eating establishment (Buffalo Wild Wings) would be stand-alone buildings. A 3,000-square foot tenant space would finish off the westerly side. Some modifications would have to be made, such as removal of some parking lot paving. This was the last development phase of The Block. Two buildings adjacent to Target remained.

**Commissioner Bonaccorsi** asked the following:

- Was the current use for the anticipated stand-alone Buffalo Wild Wings a parking area?  
*Senior Planner Nguyen replied that four approved buildings would be exchanged for the restaurant and some parking area.*
- Was there an attempt to retain the sense of walkability planned for The Block?  
*Yes, plans for Dick's Sporting Goods included breaking up the wall massing and articulation along the rear and sides. The planned pedestrian promenade had been retained with benches and trellises that would connect the theater to Target and would be built during this last phase of the development.*

**Sean Whiskeman**, Senior Vice President with Catellus Development, stated that they were the original developers of the Pacific Commons shopping center, as well as developers of The Block. This second phase of The Block had originally been planned to be a collection of smaller buildings that would have created a pedestrian experience from Pacific Commons Boulevard to the entrance of the theater. However, after three years, they had not been successful in finding the critical mass of tenants to anchor this second phase. It was decided to combine the square footage of the four smaller buildings into a one larger format store to accommodate a business that was interested in that location, which was Dick's Sporting Goods. It was just coming into the Bay Area with their closest store being located in Dublin. Their interiors were "absolutely beautiful; they carry every possible department; and, in a sense, they were a collection of smaller stores in one large store." Along the promenade would be benches and trellis elements, nice trees, a collection of pots and certain areas would have climbing rocks for small children. The building materials for Dick's Sporting Goods would have the same mix of materials as had been used in the first phase of The Block. He introduced Development Manager Doug Roth and asked for questions.

**Commissioner Bonaccorsi** stated that the applicant and his company were to be commended for this exciting retail experience that had been delivered as promised when he first came before the Commission in 2010. His questions were as follows:

- Was Buffalo Wild Wings a sports bar venue? Would it compete with BJ's?  
*Mr. Whiskeman said that was a fair comparison.*
- Do they serve beer, wine? What would be the hours of operation?  
*Yes, it was a full-service restaurant. Their preferred hours of operation would vary throughout the week, but they intended to stay open until 2:00 a.m. on weekends with alcohol not sold after 1:00 a.m.*  
*Senior Planner Nguyen added, "That's correct."*
- Where was the nearest Buffalo Wild Wings?  
*Mr. Whiskeman stated they were in Dublin and in Tracy, although the Dublin location was not a free-standing restaurant. This location will have their "Stadia" model, with new enhancements.*
- Had he talked with Dick's Sporting Goods about the ancillary firearms sales? Was that uniform among their business model?  
*Yes, he had. It was certainly an important category for them amongst many categories that they sold. It would be relatively small with a floor area of about 500-square feet, but it was a part of their national model.*
- What were the anticipated hours of operation?  
*Fairly standard of retail operation that would probably vary during the week. Typical retail was 10:00 a.m. to 9:00 p.m. In some cases, they may stay open until 10:00 and on the weekends he suspected they would close earlier.*
- Had they articulated that they would not move in if ancillary firearms sales were not a part of their business? Would it be a deal breaker?  
*He did not know if it would be a deal breaker.*

- What was the anticipated timetable before this item was heard by City Council?  
*Senior Planner Nguyen said that it was scheduled to proceed to Council on February 18<sup>th</sup>.*

**Commissioner Dorsey** asked if Buffalo Wild Wings was family-friendly before midnight and had the climbing rocks always been part of the plan. Rocks and kids go together and they were most likely to fall off.

**Mr. Whiskeman** stated that Buffalo Wild Wings was absolutely family-friendly. These were community-quality retailers. They tried to find large areas to do something other than paving, such as the eight sculptures that anchor key areas throughout Pacific Commons. Climbing rocks had been successfully done in other areas.

**Mr. Whiskeman** closed by stating that this project had been a true labor of love and he very much appreciated the staff's help over the years.

**Chairperson Reed** opened and closed the Public Hearing after no one came forward to speak.

**Commissioner Bonaccorsi** was supportive of this project. However, he asked the other Commissions "to at least consider . . . to say no to the ancillary firearms sales" and see what the discussion would be at the Council level. Firearms could be sold elsewhere, since they had a store in Dublin. This may not be the kind of use to be encouraged for Fremont.

**Principal Planner Morris** stated that the Police Department was "fine with the sale of firearms at Dick's."

**Commissioner Bonaccorsi** commented that, as an advisory board, the Commissioners could reflect a community concern or a community view that may not necessarily be the life and safety issues that concerned the Police Department, but a quality of community character that could, at least, consider that.

**Commissioner Chugh** asked if this was the first store in the City to carry firearms.

**Senior Planner Nguyen** said other stores in the City sold firearms. Retail sales of firearms was heavily regulated at the Department of Justice level, at the Federal level (ATF), as well as, the City level, which required a firearms sales permit that must be approved by the Police Chief.

**Commissioner Jones** stated that approving this use without allowing firearms sales would be equal to approving a Sears store without allowing the sale of Craftsman tools. It did not seem fair to regulate one department over another that was within a total store.

**Chairperson Reed** agreed that, with **Commissioner Jones** being a “former cop,” he had first-hand knowledge. He was a two-decade proud gun owner and firmly in favor of the Second Amendment. This store would sell guns in a responsible manner. One would not be able to go watch a movie then pick up a gun on the way out. He would not support an amendment that prohibited the sale of guns from such a responsible corporation as Dick's Sporting Goods.

**Commissioner Chugh** stated that he did not see **Commissioner Bonaccorsi's** suggestion as an affirmation or denial of the Second Amendment. His questions were:

- Would this be the only retailer allowed to sell firearms or were there others that were selling?

*Senior Planner Nguyen stated that the Police Department's Tom Mikkelsen had visited a Big 5 Sporting Goods, which sold shotguns. It was on a much smaller scale and the proposed ancillary firearms sales at Dick's Sporting Goods, one-fifth of one percent of Dick's Sporting Goods' floor area would be devoted to firearms sales.*

- If another retailer wished to sell firearms, would they need a Conditional Use Permit (CUP), along with a permit process involving police, Alcohol, Tobacco, Firearms (ATF) and all of the required Federal agencies? He feared that the Targets and Walmarts of the world would not want to lose out in a competitive market.

*He was correct. In this case, Dick's Sporting Goods would be the only retail store where ancillary firearms sales would be allowed in this area.*

- How did the approval process work?

*He was not familiar with the licensing requirement; however, from a land use regulatory zoning standpoint, this body would be considering the impacts on the surrounding properties. The CUP ensures that no adverse impact would affect neighboring properties. In this case, the Precise Planned District was the tool. He was aware that approval must be given from the Department of Justice, at the Federal level, the ATF, as well as from the City of Fremont, which must be approved by the Chief.*

- Anyone who wished to purchase a firearm could not put it on a credit card and walk out with it? Would they have to go through a background check and all of the traditional hoops? What was the process?

*That was the process, along with any other imposed conditions imposed by the City that were consistent with State and Federal laws.*

**Commissioner Dorsey** stated that the good must be considered and a decision must be made whether the good outweighed the bad. The State had the strictest gun laws in the country, so it was doing its job. She felt confident with the current regulations, although she appreciated **Commissioner Bonaccorsi's** opinion. She considered Dick's Sporting Goods as an opportunity for a wider choice for Fremont families. At

this time, only one store was available, which had limited space. Dick's Sporting Goods would allow residents to buy locally with that revenue coming to the City. She assumed that if problems arose, it could be reviewed.

**Chairperson Reed** answered, "Yes."

**Commissioner Jones** expressed the concern that a store's ability to sell its full line, regardless of what that particular product was, could be limited, which would be unfair. They should be allowed to carry their full line of products, as they would in any other city.

**Chairperson Reed** agreed. "Guns are tools and you should be sold the tools you want to use."

**Commissioner Bonaccorsi** did not wish to make this issue a Second Amendment debate. However, the City had the ability to establish what its community character was and to allow businesses to come in and thrive within the City's standards. The applicant had not indicated that no firearms sales would be a deal breaker. This advisory body could say that this family-friendly city environment agreed that Dick's Sporting Goods was appropriate without the ancillary firearms sales anywhere within this Precise Planned District. It would not impinge on the Second Amendment or on other opportunities.

**Chairperson Reed** stated that if staff had indicated that this portion of the business had not passed the mustard, passed the standard of appropriate gun sales, he would be against it. This was appropriate and what would be sold within the store should not be legislated. He would not support **Commissioner Bonaccorsi's** amendment.

IT WAS MOVED (BONACCORSI), AND FAILED BECAUSE OF NO SECOND, THAT THE PLANNING COMMISSION APPROVE STAFF'S RECOMMENDATION BUT NOT INCLUDE ANCILLARY FIREARMS SALES.

**Commissioner Bonaccorsi** stated that he appreciated the Planning Commission's consensus and he would support staff's recommendation.

IT WAS MOVED (JONES/PENTALERI ) AND CARRIED BY THE FOLLOWING VOTE (7-0-0-0-0) THE PLANNING COMMISSION RECOMMENDED THAT THE CITY COUNCIL: FIND THAT THE PREVIOUSLY CERTIFIED ENVIRONMENTAL IMPACT REPORT (SCH#19996052016), INCLUDING THE 2000 AND 2010 SUPPLEMENTS TO THE ENVIRONMENTAL IMPACT REPORT, ARE SUFFICIENT FOR THE PROPOSED PROJECT, AND THAT NONE OF THE CONDITIONS REQUIRING A NEW SUBSEQUENT OR A SUPPLEMENTAL ENVIRONMENTAL IMPACT REPORT STATED IN SECTION 21166 OF THE PUBLIC RESOURCES CODE OR IN SECTIONS 15162 AND 15163 OF THE CEQA GUIDELINES ARE PRESENT, AND THEREFORE NO FURTHER ENVIRONMENTAL REVIEW IS NECESSARY;

AND  
FIND THAT THE PROPOSED PROJECT IS IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN'S LAND USE AND ECONOMIC DEVELOPMENT ELEMENTS AS ENUMERATED WITHIN THE STAFF REPORT;

AND  
WAIVE FULL READING AND INTRODUCE AN ORDINANCE APPROVING THE MAJOR AMENDMENT TO PLANNED DISTRICT P-2000-214 AS SHOWN IN EXHIBIT "A" (2014 REVISED SUPPLEMENT B, PACIFIC COMMONS MASTER PLAN) TO REARRANGE BUILDINGS WITHIN PLANNING AREA 5 AND TO ADD ONE SPORTING GOODS STORE WITH ANCILLARY FIREARMS SALES AS A PERMITTED USE IN PLANNING AREA 5, BASED ON THE FINDINGS AND SUBJECT TO CONDITIONS OF APPROVAL AS SHOWN IN EXHIBIT "C;"

AND  
APPROVE THE PLANNED DISTRICT PLANS (SITE CONTEXT PLAN, ELEVATIONS, LANDSCAPE AND CIVIL) AS SHOWN IN EXHIBIT "B", BASED ON THE FINDINGS AND SUBJECT TO CONDITIONS OF APPROVAL AS SHOWN IN EXHIBIT "C."

**Senior Planner Nguyen** announced this item would be heard by City Council on February 18, 2014.

The motion carried by the following vote:

AYES: 7 – Bonaccorsi, Chugh, Jones, Leung, Dorsey, Pentaleri, Reed  
NOES: 0  
ABSTAIN: 0  
ABSENT: 0  
RECUSE: 0

- Item 3. **MEDICAL MARIJUANA CULTIVATION ZONING TEXT AMENDMENT – Citywide – (PLN2014-00098)** – To consider a city-initiated Zoning Text Amendment to Title 18, Planning and Zoning, of the Fremont Municipal Code prohibiting outdoor cultivation of medical marijuana, or indoor cultivation where visible from public places, in all zoning districts, and to consider an exemption from the requirements of the California Environmental Quality Act (CEQA) per Section 15061(b)(3) of the CEQA Guidelines, in that it is not an activity which would have the potential to cause a significant effect on the environment.

**Senior Planner Pullen** introduced **Lt. Tom Severance** and **Sgt. Patrick Epps** from the Police Department. He gave the legislative background of medical marijuana. Marijuana was prohibited in 1970 by Federal legislation. The Compassionate Use Act (CUA) was passed by California voters in 1996 and marijuana was legalized for

limited medical purposes. The California legislature clarified the scope of the Compassionate Use Act in 2004, which allowed cities to adopt and enforce medical marijuana regulations that were consistent with both programs. After a moratorium banning medical marijuana dispensaries, the City of Fremont banned medical marijuana dispensaries in 2006. The California Attorney General released Guidelines for Security and Non-Diversion of Marijuana Grown for Medical Use in 2008, which recommended safeguards on medical marijuana crops.

Judicial background included:

- Recent cases led to the California Supreme Court that indicated the 1996 and the 2004 Acts did not limit local land use regulation.
- Prohibition of all marijuana growth within the city would not conflict with the law.
- California and Federal courts had both recognized local concerns about illegal marijuana use associated with growing marijuana for medical marijuana uses.

The issue had come to the fore in October, 2013, when residents on Thane Street complained to the Council about a neighbor.

**Lt. Severance** stated in 2013 four outdoor marijuana growing operations were abated in residential neighborhoods, of which Thane Street was one. The plants had towered over fences in a very small, quiet street. Since enforcement and contact with the residents, the operation no longer existed after the cultivation of the marijuana they had already grown. In 2013, sixteen growing operations throughout the city were handled by the Major Crimes Unit. However, when looking back, there were only three in 2011, and in 2012 there were five. Of the four outdoor growing operations, 66.5 pounds of marijuana were recovered from 167 live plants. Two 12 gauge shotguns and one 0.45 pistol were also recovered.

**Sgt. Epps** stated that he had been with the Police Department for 28 years. He had grown up in the City of Fremont and actually had **Commissioner Bonaccorsi's** father as a vice principal at the high school he had attended. The primary citizen complaint was the offensive odor from indoor and outdoor grows. The secondary complaint involved PG&E and the fire hazard from illegal electricity used by bypassing PG&E. The Police Department was usually alerted by PG&E that "something bad's happening inside this house." In 2010 and 2011, while responding to house fires, the Fire Department had discovered, in one instance, that the PG&E power box had been bypassed and had led to a blown transformer and in the other instance, a bypass had led to a fire on the power line that had dropped into a neighbor's backyard. It was common for sophisticated growers to rent houses in residential neighborhoods. In 2012, the SWAT team assisted Milpitas Police Department on a sophisticated indoor grow operation that had originated in Santa Clara County and ended up on upscale Cougar Circle, of which the neighbors were unaware. They had been suspicious, because of the traffic in and out of the house, although no one lived there. A suspect, with weapons and violent priors, was arrested there. A recent DEA study showed



high levels of mold spore were present with indoor grows unlike in an outdoor garden. When removing plants, officers wore respirators. Also, property values were lowered in such a neighborhood.

With the relaxing of marijuana laws, more grows were taking place that provided more opportunity for the criminal element to be involved, sometimes preying on the growers. It was common knowledge among thieves that growers were an easy target, because they typically did not have AK-47s all the time. In 2010, a home invasion robbery occurred in Antioch when three suspects entered a residence with an indoor marijuana cultivation. They shot the wife and the husband shot and killed one suspect, held a second suspect at bay until the police arrived, and the third suspect escaped. That suspect was captured at a hotel in south Fremont after a huge gun battle. In 2009 a Santa Clara deputy sheriff was involved with an officer-involved shooting while assisting with eradicating a marijuana grow in the hills. In 2013, an indoor marijuana grow was discovered after a citizen called to report two male subjects who had attempted to kidnap a 12-year old girl. The kidnapping was unsubstantiated and the Police Department did not believe it had actually occurred. Two trespassing calls in 2012 led to indoor marijuana grows. The Police Department believed that many of these crimes went unreported, so the true impact to the community was undetermined.

**Senior Planner Pullen** closed by stating that enforcement and prosecution was difficult, because of the ambiguity of the State laws. The outdoor grows continued to be visible, which drew complaints from neighbors. The Zoning Text Amendment would:

- Add a definition to medical marijuana and be defined as “planting, growing, harvesting, drying or processing of plants or any parts thereof” and it would “prohibit the outdoor and the visible indoor cultivation of marijuana,” which would be when “it was not totally contained within a fully enclosed and secure structure.”
- “Prohibit indoor cultivation if it was visible from the streets, sidewalks or other public places freely accessible to the public.”
- Limit enforcement to civil enforcement as opposed to criminal enforcement.
- Renumber the dispensary ban section that was enacted in 2006, which would be a relocation of the portion of the code that dealt with dispensaries.

The two findings that must be made to approve this Zoning Text Amendment were:

- **It must be consistent with the General Plan** – This proposal would appropriately use zoning regulations in accordance with General Plan policy to improve Fremont’s quality of life, reduce nuisances and achieve compatibility between adjacent uses, and protect the health and safety of residents, visitors and workers.

- **It must be of public necessity, convenience and general welfare** – Making a change to the law in this manner would reduce negative impacts from outdoor and visible indoor cultivation of medical marijuana, which would improve neighborhood quality of life and reduce health and safety concerns.

City Council was scheduled to hear this item on February 11<sup>th</sup>.

**Commissioner Bonaccorsi's** fear was that this "legislation" would create unanticipated collateral problems that may worsen the conditions. It seemed that real concern was over indoor use, which under this proposed Zoning Text Amendment would actually be permissible. It seemed that the banning of outdoor cultivation would push that activity indoors, which would actually increase the fire hazard risk, the off-the-grid concerns of PG&E and all of the other concerns associated with indoor use. He asked the following questions:

- Would that be an anticipated, foreseeable effect if all outdoor cultivation were banned?

*Senior Planner Pullen replied that both outdoor and indoor cultivation produced negative effects. Outdoor cultivation or visible indoor cultivation was the subject of the proposed Zoning Text Amendment. The more code-related electrical, fire hazard, etc., were less serious, immediate public safety concerns than an ongoing medical marijuana grow that would be an attractive nuisance for the neighborhood.*

- Would either Police Department representative prefer a complete ban, if they had a choice?

*Lt. Severance stated that the issue was the Proposition 215 legal grows, which had been the problem on Thane Street. This tremendous grow was well-known, ruining the neighborhood, and no recourse to deal with it had been available. The person who was growing that marijuana was cooperative. He had allowed the officers to come in to look at his grow and he had the proper documentation. However, the City was not able to do anything that would lead to abatement. The indoor grows where power was being stolen, houses were being destroyed and gutted to create indoor growing operations were the illegal grows, which could normally be handled through the penal code or the health and safety code.*

- He could foresee a situation where the legal tools, through civil enforcement now available, would force the cultivation to move indoors, which would then have all the earmarks of an illegal operation to do what would otherwise be a permitted use under Proposition 215. So a permitted end use, medical marijuana, would become an illegal cultivation to have a legal product. Was not that a concern?

*It could certainly happen and it had certainly happened. He was not certain that it could be prevented, just as he was not certain that if this would push all of those outdoor grows indoor or if they did move indoor, they would suddenly become illegal indoor grows. They could be legal indoor grows by paying their legal PG&E power bills, and so on.*

- A remedy proposed by other jurisdictions was to limit the number of plants being grown outdoors. Would there be definitional problems or an accounting issue or something that the Police Department would prefer not be involved in? Why was there resistance to some sort of limitation as opposed to an outright ban on cultivation?

*Senior Planner Pullen replied that, as discussed among staff internally, enforcement would be very difficult from the standpoint of counting and following up. From a zoning perspective, the proposal before the Commission tonight would be the clearer choice.*

**Vice Chairperson Pentaleri** stated that he was very skeptical concerning both the specifics of this proposed ordinance and the rationales given for its specific formulation. His confusion regarding some of the rationales were enforced by some of the points brought up by **Commissioner Bonaccorsi**. He also saw that cultivation of legal medical marijuana would be driven indoors. He could understand neighborhood complaint about odors. However, it seemed that current nuisance ordinances should be useable to address those kinds of complaints. He made comments and asked questions, as follows:

- Why are existing nuisance ordinances inadequate for addressing that issue?

*Senior Planner Pullen stated that odor would be a difficult thing to measure for enforcement of nuisance ordinances.*

- It was not uncommon to see the city enforcing attractive nuisances. He agreed that a rationale could be made for restricting medical marijuana from the public view. What was the distinction between out of public view outdoor and out of public view indoor? He did not see the connection between the cultivation of medical marijuana outdoors and the propensity for that cultivation being illegal. Was it more likely to be illegal when grown outdoors than indoors?

*Deputy City Attorney Rasiah stated that the main thrust of the ordinance was that it was trying to protect the community interests; it was trying to guard against criminal activity; it was trying to guard against nuisance conditions within a neighborhood; the types of complaints that were brought up at the City Council meeting. Staff was trying to take a balanced approach. A few cities had tried to ban cultivation on a much broader scale. Others had taken a more regulatory approach, in terms of the number of plants, where it could be grown, along with, fence, height, setback requirements. This was a very clear, straight forward approach, which would be easier to enforce. It would balance the interests of qualified patients and primary care givers, as well as the interests of the neighborhood in guarding against criminal activities.*

- It was reasonable to restrict plants to a fenced yard and the plants should not grow above the height of the fence. If one could not see a plant from places that were accessible to the public and if one could not smell it, then it was another way to avoid attracting criminal activities. He saw no problem with people who wished to grow marijuana consistent with their personal use, as long as it was kept below

the fence line and it was kept discrete. This ordinance seemed to be mandating that illegal activities must be conducted covertly rather than in plain sight. This ordinance seemed to be contradicting the usual need for “more eyes, more visibility” as a way to keep things safe. A more reasonable approach would be that this Zoning Text Amendment should be implemented to require cultivation to be kept out of sight from locations that are accessible to the public and if odors were regulated that would be an effective way of insuring any outdoor operations would be on a small scale.

- Page 107, paragraph 10 – The City would be able to prevent illegal conduct associated with outdoor marijuana cultivation,” such as illegal transport and distribution of that marijuana between persons who are not qualified patients or caregivers under the Compassionate Use Act (CUA) or Medical Marijuana Program Act (MMPA).” He did not understand the rationale given and why enforcement resources would be more effective at preventing illegal transport and distribution associated with indoor cultivation than associated with outdoor cultivation. In his opinion, odors should be what was regulated.
- Paragraph 17 – “The cultivation of medical marijuana could also result in various code violations . . . and improper and dangerous electrical alterations and use. The secondary effects pose serious safety risks and require commitment of scarce police and public resources.” These risks would not be lessened by requiring cultivation indoors and could be exacerbated by inducing people to undertake electrical alterations that would not be required if outdoor cultivation were to be allowed. Why prohibit an activity because of the other stupid things that people “might” do? Regulations and controls already existed that would address those other potentially hazardous activities.

**Chairperson Reed** called for a recess for the stenographer at 8:20 p.m.

**Chairperson Reed** reconvened the meeting at 8:30 p.m. and asked staff to reframe this issue and what the Commission’s purview was.

**Deputy City Attorney Rasiah** explained that this ordinance would bar outdoor cultivation of marijuana, as defined in the ordinance and it would also bar cultivation indoors if it would be visible from the street, sidewalk or any other place available to the general public. Enforcement would take place through civil remedies as opposed to criminal remedies, because under the Compassionate Use Act, Proposition 215, certain types of crimes under State law could not be prosecuted against certain individuals who had a physician’s recommendation for the medicinal use of marijuana. The idea was to prevent impacts on neighborhoods. Staff believed that existing rules were not sufficient, because the use had been established and it had already impacted the neighborhood. The idea was to avoid the impact.

**Vice Chairperson Pentaleri** continued with his comments and questions:

- The presentation had focused on large operations and the photos were impressive. Were they of Thane Court with the plants to the roof?

*Lt. Severance said, “Yes.”*

- What about much smaller operations?

*They varied from a single, tiny plant in the house to the large grows.*

- Finding 18 stated, “The City anticipates further complaints if action is not taken.” The City will receive complaints whether action was taken or not.
- Page 108, Section 18.190.095, Paragraph A – Cultivation of Medical Marijuana a Prohibited Use – “ ‘Outdoor’ ” means any location that is not totally contained within a fully enclosed and secured structure.” If this ordinance moved forward, it was important to define “outdoor,” “fully enclosed” and “fully secured.”
- Paragraph B – Indoor cultivation of medical marijuana is prohibited if it is visible from streets, sidewalks and other places freely accessible by the public. He suggested deleting Paragraph A and revising B to read, “Cultivation of medical marijuana, whether indoors or outdoors, is prohibited if it is visible from streets, sidewalks and other places freely accessible by the public.” He also suggested adding a new paragraph that read, “Cultivation and processing of medical marijuana, whether indoors or outdoors, is prohibited if odors associated with such cultivation or processing create odors that become a nuisance at offsite locations on either private property or places that are freely accessible to the public.”
- He could not support Finding 19 – “An ordinance prohibiting outdoor cultivation and indoor cultivation visible from the public view is necessary and appropriate to maintain and protect public health, safety and welfare of citizens of Fremont.”

**Commissioner Dorsey** asked the following questions:

- Do people who grow medical marijuana need to have a license or do they need to register with any agencies?

*Deputy City Attorney Rasiah replied that in 2003 the State legislature enacted the Medical Marijuana Program Act, which created the Medical Marijuana Identification Program. This allowed the identification of the people who would qualify under the Compassionate Use Act for the use of marijuana so that they would not be prosecuted under State law for certain marijuana-related offenses. That allowed the ability to obtain a Medical Marijuana ID card from the county.*

- Did that limit the number of plants that were allowed to be grown?

*No. It was just a way to identify those people who were qualified patients of their primary caregivers. Elsewhere in the MMPA, the permissible amount of plants was discussed, but case law had muddied the waters. The norm was six mature or 12 immature plants.*

- How many plants had been found on Thane Street?

*Lt. Severance had heard that it was about 18 plants outdoors; however, plants were also being grown indoors. Judging by the photos, he guessed it was probably more.*

- Technically, would that have been illegal, because they had exceeded the number of plants? Or did it depend upon how many people in the residence held cards? Was it per person or per residence?

*Deputy City Attorney Rasiah stated that it was decided by the qualified patient or their primary caregiver. This illustrated the difficulty for enforcement when calculating the number of plants, the number of the qualified patients and the primary caregivers.*

- She concurred with the Commissioners who had spoken before her.
- Could the City have a height restriction for plants? Or would it be wiser to not allow the visibility to be above the height of a standard fence?

*A height limit would require someone to actually measure whether a plant(s) exceeded the height limit. Visibility was a clearer standard, which is why that approach had been chosen.*

- Would growing be restricted near schools?

*State law had existing restrictions regarding medical marijuana establishment, operations and proximity to schools.*

- Are other cities in the Bay Area passing anything similar to this ordinance?

*The Town of Moraga and the City of Concord had ordinances that were fairly similar; and Martinez was at the same stage as Fremont was at this time. Other cities had taken a more regulatory approach.*

- When addressing growing marijuana on balconies in apartment complexes, didn't the apartment complexes have complete control through their regulations?

*It was almost universal for apartment complexes and common interest developments, such as townhomes and condominiums, to have their own internal rules of governance.*

- Would the law enforcement officers say that this was a huge problem in Fremont? Had the amount of time dealing with these issues increased, such as "sucking up our resources," changed very much over the last five years? Was this something they were really concerned about?

*Lt. Severance stated that 2011 had three grows, 2012 had five and 2013 had 16. So, it was taking much more of the Major Crimes Unit's time, which was responsible for eradication of marijuana grows. It also covered Union City and Newark. Some illegal indoor and/or outdoor grows had thousands of plants, which took days to dismantle and more days to package it up as evidence.*

**Commissioner Jones** asked if the Commission was being asked to decide whether medical marijuana could be grown outdoors and within public view.

**Deputy City Attorney Rasiah** stated that he was correct; either 1) outdoors or 2) indoors, but invisible from public places.

**Commissioner Jones** stated that the odor could not be regulated. Aside from someone seeing it and realizing it was marijuana, it would attract the criminal element that would come in and steal plants or what have you. However, even if the plants could not be seen, they would still be smelled by someone walking by. That issue would be eliminated if the plants were growing indoors, along with eliminating the use of law enforcement resources, because it would not be as noticeable. The basic issue was, would one want to live next door to a grow and be forced to smell it 24/7? He did not like the smell of marijuana and would not like to have it growing next door to him.

**Commissioner Leung** believed that this issue was rather under-regulated at this time. She appreciated the officers' presentation, as she had been under the impression that marijuana was grown only in Mendocino County. She assumed that people who grew marijuana in rented houses were not necessarily Fremont residents. There were many ways for medical marijuana users to obtain the marijuana they need, so she would support this ordinance.

**Vice Chairperson Pentaleri** offered to make a motion.

**Deputy City Attorney Rasiah** noted that the public had not spoken, yet.

**Vice Chairperson Pentaleri** believed that if the focus was on visibility and odor, as detected off the premises, the scale of the operation would be adequately controlled. A Thane Street operation would not be enabled. A property of a certain size would be needed and plants would not be located next to the fence line adjacent to the neighbors. His interest was chickens and he suspected that if he had so many chickens that they created an odor nuisance, someone from Animal Control would knock on his door to discuss it. He saw no difference.

**Commissioner Chugh** stated that he saw that this requested change would allow the City's public safety agencies to have the additional tool kit needed to deal with the possible illegal marijuana-growing households to the point that it would be considered acceptable. He felt that he did not know the difference among some of the suggestions and he was not certain that he could make a decision at this time.

**Commissioner Bonaccorsi** asked what the debate was about banning medical dispensaries completely. If medical dispensaries were allowed in Fremont, perhaps there would be less of a need for outdoor cultivation.

**Deputy City Attorney Rasiah** replied that approach had been driven by similar concerns about the secondary effects and criminal activity of dispensaries. That was decided in 2006, which was relatively early on in the medical marijuana debate.

**Captain Kimberly Peterson**, Fremont Police Department, stated that this discussion was an example of discussions that were going on throughout the whole state. This was a common-sense way for the City to deal with the fact that this is a public problem. The anger and disgust from the people on Thane Court, who were taxpaying, law abiding citizens, was unbelievable. They called the Police Department over and over, because the odor was so strong that some were getting headaches. The Police Department went out many times and, after looking at the paperwork, could not do anything. What was to be done when a situation had clearly become a public nuisance, it was bothering the neighbors, it was bringing down the home values and the criminal element was coming in and out of the court? A common sense tool was needed to prevent a public nuisance, to prevent that anger and upset, to prevent the criminal activity and also to give a reasonable tool to the Police Department. How would odor be regulated? Does one stand 50 feet away? Was it checked when the wind was blowing a certain direction? There was no tool to measure odor, so let's get it inside. They wanted to be able to allow people who needed marijuana to have it inside their home away from the public view. It would not bring down property values, and no one would know about it. Outdoor cultivation enforcement would be simplified by telling the owner to take care of it through a civil remedy.

**Chairperson Reed** opened and closed the Public Hearing.

**Commissioner Chugh** moved staff recommendation and seconded by **Commissioner Leung**.

**Commissioner Bonaccorsi** suggested, assuming that it would be recommended by the Commission and City Council would approve it, that a friendly amendment be added to bring it back within a year for review of the implementation of the ordinance and to see if collateral issues needed to be revisited. Only one side of the debate had been heard. No cultivators who may have had the four to six plants had spoken tonight. There had not been enough balanced presentation to consider if there were some alternative ways to address this issue.

**Commissioner Chugh** stated that he would allow the amendment.

**Principal Planner Morris** stated that staff would come back in a year to provide additional information to the Commission, but this Zoning Text Amendment would not be brought back for revision.

Both **Commissioner Bonaccorsi** and **Commissioner Chugh** agreed.

**Vice Chairperson Pentaleri** indicated that he had previously wanted to make a separate motion and **Commissioner Chugh** agreed to withdraw his motion but was not sure that he would support the new motion.

**Vice Chairperson Pentaleri** recommended an ordinance that would allow the Police Department to have an effective mechanism that would allow them to address another



Thane Street-type situation. His recommendation was to return the draft ordinance to staff to allow them to tailor it along the lines that he had described before. In particular, he would like to see the suggestion under Section 18.190.095, deleting paragraph A and revising paragraph B to read, "Cultivation of medical marijuana, whether indoors or outdoors, is prohibited if visible from streets, sidewalks and other places freely accessible by the public." Also, he would add a new paragraph that would address not only cultivation, but also processing, which had not been discussed, at all. "Cultivation and processing of medical marijuana, whether indoors or outdoors is prohibited if odors associated with such cultivation or processing become a nuisance at offsite locations on either private property or places that are freely accessible to the public." He believed that the processing of marijuana also generated odors and could become a nuisance.

**Commissioner Bonaccorsi** seconded the motion for the purposes of discussion. He also asked if staff would be willing to work with that direction and bring it back to the Commission first or would it simply go to Council with its Staff Recommendation, irrespective of **Vice Chairperson Pentaleri's** motion?

**Principal Planner Morris** stated that in the past, staff had taken the Commission's recommendations, explained the recommendation and moved forward with Staff's Recommendation. The Commission's recommendation would be included in the staff report along with Staff's Recommendation.

**Commissioner Leung** asked if this motion did not pass - **Commissioner Chugh** stated that he would make another motion. And depending how the vote went if the first motion failed, staff could incorporate the sentiment of the Commission regarding the discussion to sensitize the Council to the discussions that had occurred, as background, to allow incorporation into the review prior to their meeting.

**Principal Planner Morris** stated that he was correct. The draft minutes from this evening's meeting would be attached to the staff report for City Council's review.

**Commissioner Chugh** asked if regardless of the outcome of the vote, if another motion was made, could he articulate a few of the concerns expressed by the Commission in the context of how the vote transpired beyond just the minutes.

**Principal Planner Morris** again stated that he was correct and it was something that staff typically did, and staff could provide some additional information.

**Commissioner Bonaccorsi**, speaking to the motion before the Commission, believed it, at least, had the benefit as an anchor of addressing his concern, which was the attractiveness of a complete ban and would be easily understood for enforceability purposes. However, his concern remained that the problem would actually be worsened by pushing it indoors. The City needed to consider that the proposed solutions did not create worse problems for the very law enforcement personnel who

were strapped, anyway, and may need to respond to more indoor illegal cultivation of marijuana.

IT WAS MOVED (PENTALERI/BONACCORSI) AND CARRIED BY THE FOLLOWING VOTE (4-3-0-0-0) THE PLANNING COMMISSION – RETURNED THE DRAFT ORDINANCE TO STAFF TO ALLOW THEM TO TAILOR IT ALONG THE LINES THAT HE HAD DESCRIBED BEFORE. IN PARTICULAR, HE WOULD LIKE TO SEE THE SUGGESTION UNDER SECTION 18.190.095, DELETING PARAGRAPH A AND REVISING PARAGRAPH B TO READ, “CULTIVATION OF MEDICAL MARIJUANA, WHETHER INDOORS OR OUTDOORS, IS PROHIBITED IF VISIBLE FROM STREETS, SIDEWALKS AND OTHER PLACES FREELY ACCESSIBLE BY THE PUBLIC;”

AND

ADDED A NEW PARAGRAPH THAT WOULD ADDRESS NOT ONLY CULTIVATION, BUT ALSO PROCESSING, WHICH HAD NOT BEEN DISCUSSED, AT ALL. “CULTIVATION AND PROCESSING OF MEDICAL MARIJUANA, WHETHER INDOORS OR OUTDOORS IS PROHIBITED IF ODORS ASSOCIATED WITH SUCH CULTIVATION OR PROCESSING BECOME A NUISANCE AT OFFSITE LOCATIONS ON EITHER PRIVATE PROPERTY OR PLACES THAT ARE FREELY ACCESSIBLE TO THE PUBLIC.”

**Principal Planner Morris** stated that this recommendation would be heard by City Council on February 11, 2014.

The motion carried by the following vote:

AYES:	4 – Bonaccorsi, Dorsey, Pentaleri, Reed
NOES:	3 – Chugh, Leung, Jones
ABSTAIN:	0
ABSENT:	0
RECUSE:	0

## DISCUSSION ITEMS

## MISCELLANEOUS ITEMS

Information from Commission and Staff:

- Information from staff: Staff will report on matters of interest.
- Poll Planning Commissioners on their attendance for the February 13, 2014, 5:30 p.m., Work Session re: Warm Springs/South Fremont Community Plan

**Principal Planner Morris** stated that an email would be sent soon.

- Report on actions of City Council Regular Meeting

None

- Information from Commission: Commission members may report on matters of interest.

**Chairperson Reed**, noting the Police Department officers' badges were covered, called for a moment of silence for the BART officer killer earlier this week.

Meeting adjourned at 9:15 p.m.

SUBMITTED BY:



Alice Malotte  
Recording Clerk

APPROVED BY:



Wayne Morris, Secretary  
Planning Commission